AS TO THE ADMISSIBILITY OF

Application No. 27689/95
by S.H.
against Ireland

The European Commission of Human Rights (First Chamber) sitting in private on 9 April 1997, the following members being present:

Mr. M.P. PELLONPÄÄ, Acting President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 17 October 1994 by S.H. against Ireland and registered on 26 June 1995 under file No. 27689/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Irish national born in 1991. She is represented in the proceedings before the Commission by her father (NH), an Irish citizen currently living in London.

The applicant's previous application to the Commission (No. 22521/93) was declared inadmissible by the Commission on 1 December 1993. It concerned complaints under Articles 3, 8, 13 and 14 in relation to the refusal by the Irish authorities of the applicant's mother's (G.A.A.) visa application. The application was declared inadmissible on grounds of non-exhaustion, the applicant not having taken constitutional proceedings. The facts, as submitted by the applicant and which may be deduced from the documents lodged with the application, may be summarised as follows.

A. Particular facts of the case

1. Visa applications

NH emigrated from Ireland when he was 14 years old and later

married G.A.A., a Ghanaian national. The couple have two children, one of whom is the applicant who has cerebral palsy.

NH and G.A.A. originally lived in Ghana. Due to the detention of NH as an alleged spy, NH and G.A.A. moved to Bulgaria in 1991 where the applicant was born on 7 April 1991. On 1 March 1992 the family moved to Greece where G.A.A. applied for an Irish visa. On 9 March 1992 G.A.A. returned to Accra, Ghana. On 26 March 1992 NH was informed by the Irish Embassy in Athens that G.A.A.`s application for an Irish visa had been refused. In or about April 1992 NH moved to London, apparently with the applicant and her sibling.

On 14 May 1992 NH was informed by the Irish Embassy in London that the Department of Justice would not enter into correspondence with him. The Embassy added, however, that G.A.A. could submit a new visa application at any time and supplied an application form. On 17 May 1992 G.A.A. again applied for an Irish visa. On 24 July 1992 NH was informed by the Irish Embassy in London that G.A.A.`s latest application had been unsuccessful. G.A.A. asked for reasons for the refusal and applied for Irish citizenship.

On 29 June and 30 July 1992 NH wrote to the Irish Embassy in London, requesting information about the Irish domestic remedies available to G.A.A. No reply was given to him. On 16 September 1992 the Irish Embassy in London informed NH that they do not generally give reasons for the refusal of a visa in a particular case. On 18 January 1993 the Irish Embassy in London also informed NH that G.A.A., under the Irish Nationality and Citizenship Act 1956, could not apply for post-nuptial citizenship as she and NH were not living together as husband and wife.

A further application for a visa was refused on 12 May 1993. By letter dated 21 July 1993 NH was informed that the Minister for Justice had reviewed G.A.A's case. However, and on the basis of the information supplied, it was considered that it would not be justified to grant a visa. On 23 October 1993 the Minister for Foreign Affairs replied to NH's Member of the European Parliament (MEP) as regards the visa application. The Minister explained that the visa application, presented to the Irish Embassy in London by NH, indicated that G.A.A. intended to reside with NH in the United Kingdom. The application was reviewed by the Department of Justice but was not approved as it was suspected that G.A.A. intended to use an Irish visa to enter the United Kingdom. Accordingly, NH was advised that G.A.A. should apply for a visa for the United Kingdom.

Further to another letter from the applicant's father's MEP, the Private Secretary to the Minister for Foreign Affairs pointed out, in a letter dated 13 January 1994, that G.A.A.'s application stated that G.A.A. intended to rejoin her family but that her address in Ireland was "not yet determined". The Minister for Justice had already looked at this case and concluded that she would not be justified in granting a visa. NH's most recent letter of 24 November 1993 had been brought to the Minister's attention and she remained unconvinced that G.A.A.'s intention was to come and live in Ireland and, accordingly, the Minister's decision remained the same.

By letter of 24 February 1994 NH was informed that the Minister had again reviewed the case but, on the basis of the information supplied, considered that it would not be justified to grant the visa.

2. The applicant's birth certificate

After the applicant's birth, NH sent the applicant's Bulgarian birth certificate to the Irish Embassy in Moscow together with his passport in order to have the applicant included on his passport. NH received back from Dublin his own passport with the applicant's name included thereon but not the birth certificate. The applicant claims

that NH then wrote to the Irish Embassy in Moscow and in London and to the Irish Minister for Foreign Affairs in an effort to get back the applicant's birth certificate and that on all occasions either the reply was unhelpful or none was given.

On 9 January 1995 NH's passport expired and he immediately notified the Irish Passport office in Dublin of this expiration, of the fact that the applicant's birth certificate had not been returned from the Irish embassy in Moscow and that, accordingly, he could not put the applicant on his renewed passport. The applicant maintains that the Passport Office said they would contact the embassy in Moscow but that NH has heard nothing since.

3. Legal aid applications

Pursuant to the decision of the Commission of 1 December 1991, NH wrote to the Irish Legal Aid Board (LAB) on 17 January 1994 to the effect that the applicant wished to apply for legal aid. This letter was acknowledged by the Irish LAB by letter dated 1 February 1994. The applicant was furnished with the necessary legal aid forms by the Irish LAB in or around August or September 1994 and these were completed and submitted to the English LAB (which body was to process the legal aid application to the Irish LAB). On 14 October 1994 the English LAB informed the applicant that English legal aid forms were required. These were completed and submitted to the Irish LAB by the English LAB on 29 November 1994 and on 22 December 1994. The Irish LAB again confirmed that Irish legal aid forms were required and these were forwarded by the English LAB on 13 December 1994.

By letter dated 2 February 1995 to NH, the Irish LAB stated that the application for legal aid had been refused pursuant to the provisions of para. 3.2.3 (5) of the Civil Legal Aid and Advice Scheme namely, on the basis that the applicant had failed to provide such information as was required under the provisions of para. 4.8.1 of that Scheme. NH was informed that it was open to the applicant to appeal the decision to an appeal committee of the Irish LAB.

By letter dated 6 February 1995 to the Irish LAB the applicant indicated that she wished to lodge an appeal. By letter dated 26 March 1995 the applicant also lodged a further application for legal aid for proceedings in relation to her birth certificate.

By letter dated 25 April 1995 the Irish LAB requested NH to clarify the grounds upon which the initial legal aid application had been made and to confirm when and by whom he had been notified of the refusal of legal aid and of the appeal. NH was also requested to outline the precise grounds for the applicant's second application for legal aid. NH responded by letter dated 1 May 1995. The applicant claims that no response has been received from the Irish LAB in relation to the appeal or the second application for legal aid.

B. Relevant law and Practice

Section 33 of the Bulgarian Regulation on the Civil Register 1975 (as amended) provides that any interested party can obtain an official copy of a birth certificate free of charge. Subsequent copies are available for a fee.

COMPLAINTS

1. The applicant complains under Article 8 of the Convention about the refusal by the Irish authorities of a visa for her mother.

2. She also complains under Article 5 of the Convention and Article 1 of Protocol No. 1. about the failure of the Irish authorities to return her birth certificate.

3. She further complains under Article 6 of the Convention about the nature of the body that took the decisions on her mother's visa application and about the refusal of legal aid.

4 The applicant also complains under Articles 1, 3, 13, 14, 17 and 18 of the Convention.

THE LAW

1. The applicant complains about the refusal by the Irish authorities of a visa for her mother and submits that that refusal led to her separation from her mother. She argues that she should be exempted from any obligation to exhaust domestic constitutional remedies in this respect because of the alleged denial of legal aid. However, the Commission finds it difficult to establish, from the documentation submitted by the applicant, the position as regards any legal aid applications made by the applicant. Accordingly, the Commission has not considered whether the applicant can be so exempted.

However, the complaint is, in any event, inadmissible for the reasons set out below. In this respect, the Commission notes that it has received further relevant information and documentation from the applicant in relation to this complaint in the course of the present application. Article 8 (Art. 8) of the Convention, insofar as relevant, reads as follows:

> "1. Everyone has the right to respect for his ... family life, ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission considers that there exists family life within the meaning of Article 8 (Art. 8) between the applicant and G.A.A. since the applicant was born of a marital union and since the Commission does not consider that there exist any exceptional circumstances which would break that bond of family life (see, for example, Eur. Court HR, Ahmut v. the Netherlands judgment of 28 November 1996, to be published in the Reports of Judgments and Decisions for 1996, para. 60).

The Commission also considers that it is not necessary to decide whether there has been a justifiable interference with the exercise of the applicant's right to family life or a failure on the part of that State to comply with a positive obligation under Article 8 (Art. 8) of the Convention because the applicable principles are similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole and, in this respect, the State enjoys a certain margin of appreciation (Eur. Court HR, Gül v. Switzerland judgment of 19 February 1996, to be published in the Reports of Judgments and Decisions 1996, para. 38 and the Ahmut v. the Netherlands judgment, loc. cit., para. 63).

The Commission also recalls that, in addition to the above principles, further principles are considered by the case-law to apply when the matter concerns immigration matters. In this respect, the Commission recalls that the extent of a State's obligation to admit to its territory non-nationals will vary according to the particular circumstances of the persons involved and the general interest. In addition, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry

of non-nationals into its territory. Furthermore, Article 8 (Art. 8) cannot be considered to impose on a State a general obligation to respect the choice of immigrants of the country of their matrimonial residence or to authorise family reunion on its territory (Eur. Court HR., Gül v. Switzerland judgment, loc. cit., para. 38 and the Amhut v. the Netherlands judgment, loc. cit., para. 67).

Accordingly, as in the above-cited Gül and Ahmut cases, in order to establish the scope of the Irish State's obligations, the facts of the case must be considered.

It is true that the applicant and her father, NH, are Irish nationals and that the applicant submits that the family wish to establish their home in Ireland.

However, the applicant left Greece in April 1992 when she was one year old with NH and settled in the United Kingdom. She has been living in the United Kingdom since then with NH and is now almost 7 years old. The applicant and G.A.A. were separated when the latter left Greece to return to Ghana in March 1992 namely, before the refusal by the Irish authorities of the first visa application.

In addition, NH emigrated from Ireland when he was 14 years old and he has lived abroad since then. Moreover, the applicant has not provided the Commission with any address in Ireland where G.A.A. and the family intend to settle or with any other details of existing connections to or of plans for a future life in Ireland. Furthermore, the Commission notes that there is nothing to prevent the applicant's mother from applying for a visa for the United Kingdom where her husband and children have resided for almost five years. Furthermore, the Commission recalls that the letter of the Private Secretary to the Minister for Foreign Affairs of the 13 January 1994 noted that the application for a visa stated that G.A.A. intended to rejoin her family but that G.A.A.'s address in Ireland was "not yet determined".

It was against this background that the Irish authorities formed the view that G.A.A.'s application indicated that she intended to reside in the United Kingdom and to use an Irish visa to enter the United Kingdom. Accordingly, the visa application was refused and G.A.A. was advised to apply for a visa for the United Kingdom (see the Minister of Foreign Affairs' letter dated 23 October 1993).

In such circumstances the Commission considers that the refusal of a visa to G.A.A. by the Irish authorities does not disclose a lack of respect for the applicant's family life.

2. The applicant also complains about the failure of the Irish authorities to return her birth certificate which means that she cannot either obtain a passport in her own name or be included on her father's passport. Accordingly, she submits that she cannot travel to see her mother because she requires a passport to travel and that her father cannot renew his own passport with her name on it and he requires his passport for business purposes. The applicant invokes Article 5 (Art. 5) (resulting restrictions on her freedom of movement) and Article 1 of Protocol No. 1 (P1-1) in relation to the applicant's deprivation of her passport. The Commission has also considered these matters under Article 2 of Protocol No. 4 (P4-2).

Insofar as NH's inability to obtain a passport directly affects the applicant, the Commission notes that there is nothing to prevent NH obtaining a passport without the applicant being included therein. In addition, the Commission considers that the applicant has not demonstrated that she cannot obtain a further copy of her birth certificate from the Bulgarian authorities. Moreover, Article 5 (Art. 5) of the Convention does not apply to complaints in relation to restrictions of movement and travel (No. 10801/84 Dec. 3.10.88, D.R. 61, p. 62). Accordingly, the Commission considers these complaints

manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant also complains under Article 6 (Art. 6) of the Convention about the nature of the body that determined G.A.A.'s visa application and about the alleged denial of legal aid for a constitutional action regarding the refusal of that visa and for proceedings regarding the alleged refusal by the Irish authorities to return her birth certificate. The relevant part of Article 6 (Art. 6) reads as follows:

> "1. In the determination of his civil rights ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

As regards the complaints in relation to the nature of the body deciding on G.A.A.'s visa application and the alleged denial of legal aid for a constitutional action about the refusal of that visa, the Commission recalls that Article 6 (Art. 6) has no application to proceedings involving the determination of entry visas (mutatus mutandis, No. 8118/77, Dec. 15.5.84, D.R. 39, p. 119 and No. 9990/92, Dec. 15.5.84, D.R. 39, p. 119).

As regards the complaint about an alleged refusal of legal aid for proceedings in relation to the birth certificate issue, the Commission also recalls that Article 6 (Art. 6) of the Convention is not applicable when the person concerned cannot assert on arguable grounds that domestic law recognises the right claimed (No. 13557/88, Dec. 9.10.89, D.R. 63, p. 167). The applicant has not claimed or referred to any right in Irish law to the return by a State authority of a birth certificate submitted in connection with a passport application to one of the State's embassies in circumstances where the birth certificate was issued, and further copies can be obtained, from abroad.

Accordingly, the Commission finds these complaints incompatible ratione materiae with the provisions of the Convention and, as such, inadmissible pursuant to Article 27 para. 2 (Art. 27-2) of the Convention.

4. Finally, the applicant also invokes Articles 1, 3, 14, 17 and 18 (Art. 1, 3, 14, 17, 18) of the Convention.

However, the Commission does not find that the applicant has substantiated the allegations, made under Article 1 (Art. 1), that the Irish authorities have demonstrated a consistent and determined attitude of non-disclosure, misrepresentation and wilful negligence in the handling of matters concerning her and her claims. In addition, the Commission finds that the applicant has not substantiated her allegations, made under Articles 17 and 18 (Art. 17, 18) of the Convention, that the intervention of "non-democratic factions" and "secret societies" have perverted the operation of the judicial and other systems in Ireland and that Ireland has used the exhaustion of domestic remedies rule in Article 26 (Art. 26) of the Convention to prevent her from vindicating her rights under the Convention. Furthermore, the applicant's allegations of a discriminatory difference in treatment in relation to the rights guaranteed by the Convention on the grounds of her mixed race are completely unsubstantiated.

She also invokes Article 3 (Art. 3) of the Convention submitting that her separation from her mother amounts to treatment contrary to that Article. Article 3 (Art. 3) provides as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Insofar as the applicant's separation from her mother can be attributed to the Irish State, the Commission recalls that the case-law of the Convention organs establishes that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3) of the Convention and that the suffering occasioned must attain a certain level before treatment can be classified as a inhuman. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects (see, for example, Eur. Court HR, Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 162).

In the circumstances of the present case, the Commission does not consider that the applicant's complaint discloses treatment of such a nature or degree as to render it either inhuman or degrading within the meaning of Article 3 (Art. 3) of the Convention.

Finally, the applicant invokes Article 13 (Art. 13) of the Convention arguing that she did not have an effective domestic remedy in relation to the rights and freedoms guaranteed to her by the Convention. Article 13 (Art. 13) of the Convention provides that:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission recalls however that Article 13 (Art. 13) does not require a remedy under domestic law in respect of any alleged violation of the Convention. It only applies if the individual can be said to have an "arguable claim" of a violation of the Convention (Eur. Court HR, Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, para. 52). The Commission finds that the applicant cannot be said, in light of its findings above, to have an "arguable claim" of a violation of his Convention rights.

It follows that these complaints are manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO	M.P. PELLONPÄÄ
Secretary	Acting President
to the First Chamber	of the First Chamber